



[Billing Code 7709-02-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

### **Notice of Approval of Alternative Arbitration Procedure; American Arbitration Association**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of approval.

**SUMMARY:** This notice advises interested persons that the Pension Benefit Guaranty Corporation (PBGC) has approved a request from the American Arbitration Association (AAA) for approval of an alternative arbitration procedure.

**DATES:** PBGC's approval of the AAA's alternative arbitration procedure is effective January 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Bruce Perlin (*Perlin.Bruce@PBGC.gov*), 202-326-4020, ext. 6818, Office of the General Counsel, Suite 340, 1200 K Street NW, Washington, DC 20005-4026; (TTY users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4020, extension 6818 or 6757.)

### **SUPPLEMENTARY INFORMATION:**

#### **Background**

Section 4221(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), requires "any dispute" between an employer and a multiemployer pension plan concerning a withdrawal liability determination to be "resolved through arbitration." Under the MPPAA, an employer has 90 days after receipt of notice of a withdrawal liability assessment to request review of that assessment. ERISA § 4219(b)(2)(A). If there remains a dispute about the assessment of withdrawal liability, the employer may "initiate" arbitration of the dispute within a 60-day period

after the earlier of (i) the date the employer was notified of the plan's response to the employer's request for review, or (ii) 120 days after the date that the employer requested review of the withdrawal liability. ERISA § 4221(a)(1). If the employer fails to timely initiate arbitration, the assessment becomes due and owing and the plan sponsor may bring an action in a state or federal court to collect the assessment. ERISA § 4221(b).

The MPPAA directed PBGC to promulgate fair and equitable procedures for the conduct of an arbitration under section 4221 of ERISA. PBGC's implementing regulation, "Arbitration of Disputes in Multiemployer Plans" (29 CFR part 4221), was designed to provide procedures to facilitate prompt resolution of disputes by an impartial arbitrator, facilitating expeditious resolutions of disputes concerning an employer's withdrawal liability. PBGC's default arbitration procedures provide rules for the appointment and powers of the arbitrator, rules for discovery and hearings, and rules for awards, costs, filing and service (§§ 4221.4–4221.13).

#### *Scope of Alternative Arbitration Procedures*

In lieu of the default procedures, under § 4221.14 of PBGC's arbitration regulation, an arbitration may be conducted in accordance with an alternative arbitration procedure approved by PBGC in accordance with § 4221.14(c). Certain rules applicable to the default procedures cannot be varied in any alternative procedure. 29 CFR 4221.14(b). If an arbitration is conducted under a PBGC-approved alternative procedure, the alternative procedure governs all aspects of the arbitration, with the following exceptions provided in § 4221.14(b): the time limits for initiating arbitration may not differ from the time limits provided § 4221.3; the arbitrator must be selected after the initiation of arbitration; the arbitrator must give the parties an opportunity for prehearing discovery that is substantially equivalent to that required by § 4221.5(a)(2); copies of

the award must be made available to the public at least to the extent mandated by § 4221.8(g); and the arbitration costs must be allocated in accordance with § 4221.10.

#### *Process for Approval of Alternative Arbitration Procedures*

Under § 4221.14(c) PBGC may approve arbitration procedures on its own initiative by publishing an appropriate notice in the **Federal Register**. Additionally, the sponsor of an arbitration procedure may request PBGC approval of its procedures by submitting an application to PBGC. The application must include: (1) a copy of the procedures for which approval is sought; (2) a description of the history, structure and membership of the organization that sponsors the procedures; and (3) a description of the reasons why, in the sponsoring organization's opinion, the procedures satisfy the criteria for approval set forth in this section.

#### *Criteria for Approval of Alternative Procedures*

Under § 4221.21(d), PBGC shall approve an application if it determines that the proposed procedures will be substantially fair to all parties involved in the arbitration of a withdrawal liability dispute and that the sponsoring organization is neutral and able to carry out its role under the procedures. PBGC may request comments on the application by publishing an appropriate notice in the **Federal Register** and notice of PBGC's decision on the application shall be published in the **Federal Register**. Unless the notice of approval specifies otherwise, approval will remain effective until revoked by PBGC through a **Federal Register** notice.

#### *AAA's Alternative Arbitration Rules—1981 & 1986 MPPAR*

In 1985, on its own initiative, PBGC approved the 1981 Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes (the "1981 MPPAR"), an alternative arbitration procedure sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association (AAA). 50 FR 38046 (Sept. 19, 1985).

In 1986, PBGC approved AAA's request to use an amended MPPAR (the "1986 MPPAR") which eliminated certain procedural differences from the 1981 MPPAR and PBGC's final arbitration regulation. 51 FR 22585 (June 20, 1986). The administrative fee schedule for handling arbitrations in the 1986 MPPAR was applicable until 2013, at which point AAA adopted an updated 2013 Fee Schedule, creating a revised MPPAR, effective February 1, 2013 ("2013 MPPAR"). The new Administrative Fee Schedule provides for increases to the Initial Filing Fee, establishes two different fee arrangements—the Standard and Flexible Fee Schedules, and adds a "Final Fee" under each schedule and a "Proceed Fee" in the flexible schedule context. Other than significant changes to the Administrative Fee Schedule and the removal of language regarding the apportionment of fees, the 2013 MPPAR are identical to the 1986 MPPAR that PBGC previously approved. Under § 4221.14, AAA has requested PBGC approval of the updated proposed 2013 MPPAR (the "Application").

#### *Procedural Background*

PBGC published a notice of the AAA's request in the **Federal Register** at 81 FR 15578 (March 23, 2016), to advise interested persons of the AAA's Application for approval and solicit their views on it. PBGC received four comments in response to the March 23, 2016 notice. PBGC then invited AAA to respond to the public comments. PBGC published AAA's response in the **Federal Register** at 82 FR 27089 (June 13, 2017), and solicited additional comments. PBGC received one final comment. After the final comment period closed, PBGC and AAA began discussions on changes to the 2013 MPPAR.

#### **AAA's Application**

AAA's Application included the necessary information under § 4221.14(c): a copy of the 2013 MPPAR; a description of the history, structure and membership of AAA; and a discussion

of the reasons why, in AAA’s opinion, the 2013 MPPAR satisfies the criteria for PBGC approval under § 4221.14(d). In response to the public comments and discussions between AAA and PBGC, AAA submitted the proposed rules modifying the 2013 MPPAR (“the 2019 Rules”), which completely revised the applicable fee schedule, added language regarding the apportionment of fees, and revised procedural rules related to the arbitrator selection process.

*§ 4221.14(c)(2)—History and Structure of AAA*

AAA’s Application provided:

The **American Arbitration Association (AAA)**, is a not-for-profit organization with offices throughout the U.S. as well as abroad. AAA has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court. The AAA is named in 40 federal statutes and regulations, as well as over 300 state statutes and regulations. The AAA is not a membership organization.

The AAA role in the dispute resolution process is to administer cases, from filing to closing. The AAA provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution (ICDR). The AAA’s and ICDR’s administrative services include assisting in the appointment of mediators and arbitrators, setting hearings, and providing users with information on dispute resolution options, including settlement through mediation. Ultimately, the AAA aims to move cases through arbitration or mediation in a fair and impartial manner until completion.

Additional AAA services include the design and development of alternative dispute resolution (ADR) systems for corporations, unions, government agencies, law firms, and the courts. The Association also provides elections services as well as education, training, and publications for those seeking a broader or deeper understanding of alternative dispute resolution.

*§ 4221.14(c)(3)—Discussion of Why the 2013 MPPAR Satisfies the Criteria for PBGC Approval under § 4221.14(d)*

AAA’s Application provided:

The American Arbitration Association (AAA) has been administering the cases that fall under the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes for thirty-four (34) years. The rules that have been previously approved by the PBGC are effective June 1, 1981 and revised effective September 1, 1986. The AAA’s 1986 MEPPA Rules did not change; the only update made was to

increase the administrative fees for handling MEPPA arbitrations from the 1986 fee schedule to the 2013 fee schedule.

The AAA has provided quality administration on this caseload and based on parties and arbitrator feedback, the AAA's service is valued and should continue to be available. However, as a not-for profit organization that receives funding only through the administrative fees earned on cases, we need to ensure that the costs associated with the administration of a particular caseload do not vastly exceed the fees earned.

The fee increase implemented by the AAA was necessary because of the substantial administrative costs and staffing associated with these complex arbitrations. In particular, MEPPA arbitrations are similar to many of the large complex arbitrations administered by the AAA. They tend to be highly contentious, involve large dollar amounts, the parties engage in voluminous discovery, and there can be multiple preliminary calls as well as multiple days of evidentiary hearings, can be pending for long periods of time, involve bifurcated issues and extensive briefing.

The AAA also found it necessary to implement a substantially heightened arbitrator disclosure requirements based on the nature of the MEPPA cases. All of these factors were considered when reviewing the fee schedule and a determination was made to change the fees from the 1986 \$650.00 fee to the 2013 fee schedule. The 1986 fee schedule provided the AAA discretion to set the fee where the net amount in dispute was in excess of \$5 million. Given this level of discretion provided in the 1986 fee schedule, the AAA did set administrative fees equivalent to those reflected in the 2013 fee schedule for cases with claims in excess of \$5 million. In addition, the 2013 fee schedule is the same schedule the AAA has applied to other arbitrations caseloads that are similarly complex.

The American Arbitration Association was founded in 1926, following enactment of the Federal Arbitration Act, with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes. This legal framework was passed by Congress and signed by President Calvin Coolidge. The AAA's staff members and neutrals continue to live out the principles on which the Association was founded.

The AAA's official mission statement and vision statement are based on three core values: integrity, conflict management, and service. We have a long term working relationship with the Arbitrators on the MEPPA Panel. In addition to managing this panel, the AAA recruits Arbitrators who meet the criteria established for admission to this panel. The AAA has long held its mediators and arbitrators to strict codes of ethics and model standards of conduct to ensure fairness and impartiality in conflict management. To further ensure the AAA's integrity, however, the Association also developed Standards of Ethics and Business Conduct for its staff, as well as a general Statement of Ethical Principles to expand on its core values as an organization.

## Public Comments and Resulting Changes to 2019 Rules

All interested persons were invited to submit written comments on the Application request. PBGC received four comments. Each commenter urged PBGC to reject AAA's Application on the basis that the fees in the 2013 MPPAR were too high. Three commenters maintained that AAA's Application did not substantiate the significant increase in fees under the 2013 MPPAR. Another commenter suggested that a reasonable fee increase to account for the passage of time since the 1986 MPPAR made sense. PBGC agrees that a modest increase from the 1986 MPPAR is reasonable. In response, AAA proposed a modified fee structure that removes the Final and Flexible fee schedules and considerably reduces the initiation fees:

	<b>1986 MPPAR</b>	<b>Proposed 2013 MPPAR</b>	<b>Proposed 2019 Rules</b>
<b>Amount in Dispute</b>	<b>Initiation Fee</b>	<b>Maximum Fees</b>	<b>Initiation Fee</b>
Less than \$1M	\$650 - \$1,000	\$1,550 - \$11,200	\$2,500
\$1M-\$5M	\$1,000-\$1,450	\$14,400	\$3,750
\$5M and above	Case-by-case	\$14,400 - \$77,500	\$5,000

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removal of the Final and Flexible fee schedules, the 2019 Rules provide for additional fees for matters that are in abeyance for over one year (\$300) and a hearing rescheduling fee (\$150). The 2019 Rules also include a Refund Schedule based on the timing of a case settlement or withdrawal, however \$750 of the Initiation Fee is non-refundable. Other than these fees, parties initiating arbitration will only be required to pay the Initiation Fee and the Final Fees are no longer applicable. With these changes and the adjustment to the Initiation Fee schedule, PBGC has determined that the 2019 Rules are fair and equitable based on AAA's Response and follow-up discussions between PBGC and AAA. The 2019 Rules provide for a reasonable inflation

adjustment from 1986 and also account for resources that were not necessary in 1986 such as cyber-security.

Three commenters pointed out that the 2013 MPPAR did not specifically provide for apportionment of the initiation fees between the parties. Additionally, two commenters suggested that the initiation fee should be split in advance of the arbitration. Under § 4221.10, “other costs of arbitration” are required to be “borne equally unless the arbitrator determines otherwise” and § 4221.14(b)(5) requires alternative procedures to allocate the cost of arbitration in accordance with § 4221.10. Therefore, PBGC agrees that the 2019 Rules should specify that the arbitration fees should be borne equally, subject to arbitrator discretion. However, due to the pay first, dispute later arrangement that MPPAA requires, PBGC does not agree that the initiation fee should be borne by both parties equally in advance of the arbitration. Section 47 of the 2019 Rules specifically provide for apportionment, as follows:

An Initial Filing Fee is payable in full by the filing party when a claim, counterclaim, or additional claim is filed, subject to final apportionment by the Arbitrator in the Award.

*Fee Apportionment*

Under 29 CFR 4221.10, the cost of arbitration shall be borne equally by the parties, unless the arbitrator determines otherwise. § 4221.14 (b) (5) also requires alternative procedures to allocate the cost of arbitration in accordance with § 4221.10.

The inclusion of this language in the 2019 Rules addresses PBGC’s concerns regarding fee apportionment and is consistent with § 4221.10. Two commenters focused on the arbitrator selection process and, specifically, AAA’s ability to unilaterally appoint an arbitrator if the parties cannot agree on an arbitrator selection. One of those commenters also pointed out that AAA’s process for disqualification of an arbitrator is inadequate as compared to PBGC’s default



rule. Although the arbitrator selection process in the proposed 2013 MPPAR did not differ from the approved 1986 MPPAR, PBGC believes the commenters raised valid concerns with the arbitrator selection process. PBGC's 1986 MPPAR approval provided that "fundamental fairness demands that the impartiality of one in whom such powers are vested be free from reasonable doubt, and the best way to ensure that all parties will have confidence in his impartiality is to have him selected by mutual consent." PBGC's default rules under § 4221.4(e) provide that if the parties fail to select an arbitrator either party or both may seek the designation and appointment of an arbitrator in a U.S. district court pursuant to the provisions in title 9 of the United States Code. PBGC agrees with the commenters that AAA's, and not the parties' selection of an arbitrator, and their ultimate determination on a party's objection undercuts the principle of mutual consent. Therefore, PBGC recommended that AAA amend its rules consistent with § 4221.4(e) and provide a more equitable process that ensures an arbitrator is selected by mutual consent and the arbitrator removal process is more aligned with PBGC regulations. AAA agreed to provide an extended selection process if the parties cannot agree on an arbitrator, and if the parties are still unable to mutually select an arbitrator, either party may seek designation and appointment of an arbitrator in a U.S. District Court, consistent with § 4221.4(e).

Additionally, consistent with § 4221.4(b), the 2019 Rules provide for automatic removal of an arbitrator if a party objects within 10 days of a post-appointment disclosure. In that case, a new arbitrator will be selected through the mutual consent process. Objections received after 10 days of a post-appointment disclosure will be ruled on by the arbitrator, not AAA, unless the parties mutually agree to have AAA make the determination. These changes in the 2019 Rules

are found in Section 11, Appointment from Panel and Section 13, Disclosure and Challenge

Procedure:

#### Section 11. APPOINTMENT FROM PANEL

The Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of not less than five (5) persons, with a brief biographical profile and fee structure of each, chosen from the Panel. Each party to the dispute shall have fourteen days from the mailing date in which to cross off any names objected to, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the parties can agree to the submission of additional names. If the parties fail to mutually consent to the selection of an arbitrator, either party or both may seek designation and appointment of an arbitrator in a U.S. district court, consistent with 29 CFR 4221.4(e).

#### Section 13. DISCLOSURE AND CHALLENGE PROCEDURE

A person appointed as neutral Arbitrator shall disclose to the AAA any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such Arbitrator or other source, the AAA shall communicate such information to the parties, and, if it deems it appropriate to do so, the Arbitrator and others.

In the event a party objects within 10 days of a post-appointment disclosure, consistent with 29 CFR 4221.4(b), the arbitrator shall withdraw and the AAA shall select a new arbitrator by going back to the selection process. Objections received after 10 days will be determined by the Arbitrator and not the AAA, consistent with 29 CFR 4221.4(c), unless the parties mutually agree to have the AAA make the decision.

#### **Statutory and Regulatory Criteria**

In addition to requiring that alternative arbitration procedures mirror PBGC's default rules of arbitration, § 4221.14 provides the procedure and criteria for approval. The *Procedure for approval of alternative procedures* under § 4221.14(c) provides that an application requesting approval shall include (1) a copy of the procedures for which approval is sought; (2) a

description of the history, structure and membership of the organization that sponsors the procedures; and (3) a discussion of the reasons why, in the sponsoring organization's opinion, the procedures satisfy the criteria for approval set forth in 4221.14(d). The *Criteria for approval of alternative procedures* under § 4221.14(d) provides: "PBGC shall approve an application if it determines that the proposed procedures will be substantially fair to all parties involved in the arbitration of a withdrawal liability dispute and that the sponsoring organization is neutral and able to carry out its role under the procedures."

### **Determination**

In light of the significant increase of fees in the 2013 MPPAR and the comments submitted by interested parties, PBGC resumed discussions with AAA to seek changes to ensure the proposed rules were substantially fair to all parties involved in the arbitration of withdrawal liability disputes. PBGC advised AAA that three specific issues needed to be addressed for any amendment to the 1986 MPPAR to be approved: (i) Fee Increase; (ii) Apportionment of Fees; and (iii) Arbitrator Selection Process. The discussions resulted in proposed changes by AAA which are memorialized in the 2019 Rules as discussed above. PBGC has determined that the changes reflected in the 2019 Rules are consistent with the requirements of section 4221 of ERISA and the regulatory requirements under § 4221.14(d) in that they are fair to all parties involved in the arbitration of a withdrawal liability dispute and AAA is neutral and able to carry out its role under the procedures. This approval is effective unless revoked by PBGC, and future changes, including changes to the applicable fee schedule will be subject to PBGC review under § 4211.14(d).

Issued in Washington, DC.

**Gordon Hartogensis,**  
*Director,*  
*Pension Benefit Guaranty Corporation.*

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